No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA EX REL. MORRIS I. MARCUS AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioner,

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

HOMER CUMMINGS,
WILLIAM STANLEY,
CHARLES J. MARGIOTTI,
Counsel for Petitioner.

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In their briefs on the merits filed in this Court, both respondents and the Government raise certain questions which were either rejected or not passed upon by the Court below.

I.

This Suit by Petitioner Is Clearly Authorized by R. S. Secs. 3490-3493

Respondents, invoking a purported rule based on certain lower court opinions, contend that penal statutes in general and R. S. sec. 3490 in particular are to be construed strictly.[1] The Government disavows this purported rule (Gov't Br. 23), as indeed it must in view of the numerous occasions on which this Court has denied the existence of any such narrow rule of construction and reiterated instead that words of even a penal statute are to be fairly construed and given effect according to their fair meaning in accord with the evident intent of Congress. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 358-359; *United States* v. *Bowman*, 260 U. S. 94, 102; *United States* v. *Raynor*, 302 U. S. 540, 552.[2]

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[1] It is unnecessary to deny and we may even accept, arguendo, the correctness of the quotation from *Taft* v. *Stephens Lith. & Eng. Co.*, 38 Fed. 28, 29 (Resp. Br. 25; Gov't Br. 22-23). Petitioner asks nothing more than an application of the plain language to effectuate the evident purpose of R. S. sec. 3490. Respondent does not even attempt, and the Government fails utterly, to show that the language of R. S. sec. 3491 providing for a qui tam proceeding is in any wise strained to here authorize action by this plaintiff. It is equally clear that nothing has been done to make "his recovery easy". Moreover, "the statute here involved is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly." *United States* v. *Griswold*, 24 Fed. 361, 366, aff'd 30 Fed. 762.

[2] Indeed, the rule is that "a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction". *Northern Securities Co.* v. *United States*, 193 U. S. 197, 359. As was but lately said by the Circuit Court of Appeals for the Fifth Circuit in *Spivey* v. *United States*, 109 F. 2d 181, 184-185: "The force and effect of statutes of this kind, designed to prevent frauds upon the Government may not be frittered away by a mere literal construction. • • • While Criminal Statutes may not by process of construction, be extended beyond their reasonable and natural meaning, neither may they be, by the same process, deprived of their natural meaning."

Petitioner differs only on the first point in the brief of the Solicitor General, wherein the latter takes the position that petitioner here did not discover the fraud initially and therefore is not authorized to bring this suit. Neither in fact nor upon the face of the statute is such a position sound.

(1) While the considerations advanced by the Solicitor General might well be made the subject of representations to Congress in an effort to obtain amendment of the law, it is plain that the attempted construction of the existing law as it has stood since 1863 violates basic rules of statutory interpretation, is at war with the congressional intent evinced by the legislative history of the Act, ignores the background of prior legislation with respect to informer actions in the light of which this particular statutory language was enacted and must be applied, and in any event is contrary to the facts here.

(a) The statutory language in question is plain. The civil suit for violation of the provisions of R. S. sec. 5438 is authorized by R. S. sec. 3490. The language which the Government seeks to construe and limit is contained in R. S. sec. 3491:

> Such suit may be brought and carried on by any person, as well for himself as for the United States.

This language is not ambiguous. It says "such *suit* may be brought and carried on by *any* person" (emphasis supplied). Yet the Government, without even suggesting any ambiguity, seeks to limit its plain meaning by suggestions of unfair benefit to the plaintiff and inconvenience to the Attorney General. But a statute must be held to mean what the language imports:

> Where no ambiguity exists there is no room for construction. (*United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 277.)

> When [the language] is clear and imperative, reasoning ab inconvenienti is of no avail. (*The Cherokee Tobacco*, 11 Wall. 616, 620.)
>
> No single argument has more weight in statutory interpretation than this. (*Browder* v. *United States*, 312 U. S. 335, 338.)

In any event there is, manifestly, no room for this construction now urged for the first time in any court in any case.

(b) The Government's labored contention is that the legislative history "shows that Congress intended to permit actions by private individuals only when they were actually assisting the enforcement of the law by uncovering and punishing offenses against the United States" (Gov't Br. 15). The legislative history, quite to the contrary, shows that while the Congress was concerned with the investigation of frauds it was equally concerned that those guilty of fraud, many of whom were at the time well-known and notorious, should by prompt and effective judicial proceedings be forced to account for their ill-gotten gains resulting from frauds on the Government. The debates in the Senate show clearly that the concern of the legislature was not so much with the investigative faculty—many of the fraudulent contractors had been exposed and were well-known—but with the failure of public officials to protect the rights of the United States by effective court action. The facts of frauds were well-known. The trouble was that nobody did anything about them.

The statute is to be construed in the light of the particular evils at which it was aimed. *Warner* v. *Goltra*, 293 U. S. 155, 158; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489. The debate showing common agreement as to the purpose of the act and the evils which it sought to remedy may be considered. *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*,

295 U. S. 602, 625. It is plain that one primary and definite objective was to protect the rights of the United States after the fact of their violation had been ascertained, by encouraging the actual bringing of suit by private individuals regardless of whether such individuals had been solely responsible for the unearthing of the existence of the fraud.

During the course of debate in the Senate the following statements were made:

> Mr. COWAN: * * * Indeed, it is not now so much for the want of law that this mischief prevails everywhere, as it is from a seeming utter unwillingness on the part of those in authority to vindicate the laws that already exist by subjecting to punishment those who are guilty.
>
> I am not so certain but that there are now on the statute-book laws ample to provide for the complete punishment and prevention of these frauds but nobody does it. We appoint a committee to investigate a certain subject; that committee makes a report which astounds everybody, or certainly would astound everybody in every other country but this; and the guilty men go abroad; and they perform their customary and their usual avocations; they are received among their friends just as before; perhaps their character is somewhat heightened by the adroitness they have manifested in their diabolical schemes for the purpose of procuring money from a distracted, and what will in a short time be an impoverished country. Why is this, Mr. President? Are there no courts; are there no district attorneys; is the form of indictment lost; or is it taken to be understood that a man can cheat the Government with impunity, although as to all other people he is amenable to the municipal laws for preventing frauds and cheats? I have no doubt that if the officers of the Government would do their duty when a man is caught procuring money by these pretenses, and false and forged claims in any of the thousand modes by which it may be done,

> he could be punished. He could be now if the proper officers were on his trail, and if the proper precautions were taken to enforce the laws we now have. (Cong. Globe, 37th Cong., 3d sess., p. 954; and see also pp. 956, 958.)

The common purpose to stimulate *suits* to enforce the rights of the United States both by district attorneys and as well by others on behalf of the United States is thus apparent from the legislative history of the statute, irrespective of who discovered the facts or how they were discovered in any particular case.

That encouragement of suit as well as stimulation of investigation was an objective of the bill is also apparent from the injunction of diligence contained in section 5 of the Act of March 2, 1863, 12 Stat. 696, 698, now R. S., sec. 3492. It is there specifically made the duty of United States district attorneys to be diligent (1) "in inquiring into any violation • • • by persons liable to such suit" and (2) "to cause them to be proceeded against."

(c) Earlier statutes providing for reward to informers make it clear, not only that the undesirable features of divided control were well-known but that, had Congress desired to reward private parties who merely uncovered frauds by investigation, the form of statute appropriate to such end was well-known. The obvious method, where it was intended that the United States should retain control of the suit, as in indictments or even on informations or actions of debt for fines and forfeitures, was to provide merely that a moiety of the fine or forfeiture recovered in a Government suit should be paid to the informer. *Cf.* Act of April 30, 1790, c. 9, sec. 16, 1 Stat. 112, 116; Act of March 3, 1791, c. 15, secs. 43, 44, 1 Stat. 199, 209; Act of March 3, 1839, c. 80, secs. 6, 11, 5 Stat. 331, 335, 336; Act of March 2, 1799, c. 22, sec. 91, 1 Stat. 627, 697. *Cf. Briscoe* v. *Hinman*,

4 Fed. Cas. No. 1,887, at 153 (D. C. D. Oreg., 1869). *Matthews* v. *Offley*, 16 Fed. Cas. No. 9,290, at 1130 (C. C. D. Mass., 1839). Here, on the contrary, nothing could be clearer than the language of R. S., sec. 3491;

> Such *suit* may be brought and carried on by *any* person, as well for himself as for the United States.

Congress deliberately selected the qui tam *suit* rather than providing merely a reward for the informer. In so doing, it was following a practice as ancient as the common law. 3 Blackstone, Comm. sec. 161 (Lewis ed.).

It is thus apparent that the Solicitor General not only undertakes to construe language unambiguous upon its face but by such purported construction in large part nullifies it.

(2) Moreover, neither the respondents nor the Government present the true facts. The respondents directly, and the Government at least by implication, attempt to have it that petitioner both relied solely upon evidence discovered by the Government and slipped into court to file the action before the Government could do so. The issue so raised is as much one of fact as of law. The Government raises the point in this Court for the first time, and there is thus no record on the subject except the sworn objection and answer of petitioner (hereinafter referred to as "Objections"), filed in the court below in opposition to the petition of the United States to file a brief as amicus curiae which has been certified to this Court following the filing of the Government's brief here. Respondents themselves had previously certified to this Court the brief of the Government in the court below, which the Solicitor General here does not adopt in any part. These documents, and the facts of record, disclose the following:

(a). Although the Government's position now is that petitioner is not authorized to bring the suit (Gov't Br. 10), it

states that it has assumed that it could not bring "a separate suit • • • after petitioner commenced this action" (Gov't Br. 13). But of course, if the Government's position is correct, it could have brought its suit at any time whether or not petitioner's unauthorized action was pending. Not only that, but it was then the duty of the Government to bring its suit and not risk the litigation to private hands. Indeed, petitioner's suit did not even cover many of the PWA projects involved, because petitioner did not know about them (Objections, pp. 6-7), but the Government has made no attempt to sue upon them. Moreover, the Government has allowed the statute of limitations (31 U. S. C. sec. 235) to run on many of these projects.

(b) Elsewhere in its brief the Government confesses that it has never brought such a suit as this:

> The Government itself has not, to our knowledge, brought both types of proceedings against the same person. (Gov't Br. 45.)

In truth, the statute has lain dormant at the hands of the Government since 1863. Petitioner, and petitioner alone, has resurrected it in the attempt to secure enforcement of the Congressional mandate of the statute.

(c) Since the point now raised by the Solicitor General was not raised in either of the courts below, the facts could not be and are not in the record. Petitioner has not only spent $25,000 but presented far more evidence than the Government had ever discovered. In addition, petitioner and counsel undertook a three-month trial—the longest jury trial in the history of Pennsylvania. The Government, moreover, did not discover the frauds here involved. As set forth in the Pittsburgh Press, March 24, 1941:

> Long before the U. S. investigation the existence of this ring was common knowledge. • • •

> The case just completed revealed intimate details of the conspiracy for the first time. • • •
>
> The Pittsburgh Press published full details of that situation, called on the school board to take legal action and urged a grand jury investigation. • • •
>
> Electrical prices in Pittsburgh became scandalous—so high that they discouraged building and retarded industry. Contractors have said that they were the highest in the United States. • • •
>
> But still the school board and the city and county solicitors have taken no steps to recover the money of which they were defrauded, as repeatedly revealed by testimony in the Margiotti case. (Objections, pp. 60-63.)

The Government can thus reap little commendation for compromising its criminal proceeding for a paltry $50,000 and then ignoring the civil liability of respondents—particularly in view of the statement of Government counsel in open court in its criminal proceeding that the conspiracy here involved

> has defrauded the government out of hundreds of thousands of dollars in this immediate area. • • • The fraud on the government in this instance has amounted to somewhere in the neighborhood of half a million dollars. (Objections, p. 43.)

(d) Finally, the written record—as shown by letters passing between Margiotti, counsel for petitioner, and officers of the Department of Justice—shows beyond doubt that the Government raised no objection to petitioner's suit as such, at least acquiesced in it until just before argument in the circuit court of appeals, and in fact took the unequivocal position only that respondents were not liable either to the United States or anyone suing on behalf of the United

States. These facts—all documentary—may be summarized, chronologically, as follows:

Petitioner's counsel informed the United States Attorney of the filing of the action and stated, "We invite you to enter your appearance for the United States" (Objections, p. 23). The Department of Justice at Washington asked for and received copies of the complaint filed by petitioner (Objections, pp. 24-25). The Attorney General was asked to join in the proceedings and, in any event, to confer with counsel for petitioner (Objections, pp. 25-27). The Department of Justice took the position that there was no authority to maintain the action (Objections, pp. 29-31) because the complaint was insufficient "to state a cause of action" since suit "will lie only when such violation consists in the submission of a false claim" whereas—according to the Government then—the instant case "does not set up a violation by the submission of a false claim" (Objections, p. 33). Petitioner's counsel then pointed out that, even if no direct claim were involved, other clauses of the statute covered the case (Objections, pp. 36-39). A conference was arranged (Objections, pp. 40-41) and held in the Attorney General's own office with three officers of the Department, who felt that the matter "was the problem of the P. W. A. and not the Department of Justice," stated that the latter "probably would not join" in the proceeding, but indicated that the Department would not "place any obstacle in plaintiffs' way" (Objections, 41-42, 45-46). The Department and United States Attorney were then asked to furnish certain data (Objections, 50-52, 55-58).[3]

[3] Petitioner's counsel also asked the cooperation of PWA (Objections, pp. 28-29). PWA referred it to the Department of Justice (Objections, pp. 34-36). A conference was held and a further letter written asking cooperation (Objections, pp. 42-44). As the time of trial approached, further letters were sent asking cooperation and data (Objections, 47-50) which was finally forthcoming in part (Objections, pp. 52-53).

Upon the successful termination of the suit, the Department was advised (Objections, p. 57), to which Assistant Attorney General Thurman Arnold replied

> Congratulations on a splendid victory. (Objections, p. 63.)

The Pittsburgh Press stated

> Attorney Charles J. Margiotti rushed in where public officials feared to tread • • •
>
> Perhaps the most amazing thing about this case has been the failure of the city and county governments, the Pittsburgh school board and [state] District Attorney Andrew T. Park to seek return of the amounts of which they were defrauded • • •
>
> The federal government had to do a job that could and should have been done locally. And now a private citizen has recovered damages for the Federal government. (Objections, pp. 60-63.)

Assistant Attorney General Arnold also wrote Margiotti that

> Our attitude on appeal will be consistent with that adopted prior to the trial. (Objections, pp. 63-64.)

Thereupon, Margiotti wrote the Assistant Attorney General that

> Since the institution of this suit, many of the defendants have been transferring their real estate and disposing of their assets in a desperate effort to place their property beyond the reach of execution. • • •
>
> The defendants, through their attorneys, have been intimating that they have contacted certain representatives of the Government and that there is a likelihood that the Government is willing to relinquish its interest in the verdict, or at least they are trying to

make an effort to have the Government do so. (Objections, pp. 65-67.)

To which he received the following reply:

> We know of no attempts by the defendants to persuade the United States to relinquish its interest in the judgment, nor have we heard that the Government is even considering doing so. (Objections, p. 68.)

The details with respect to the attempt of defendants to have the Government waive its interest in the judgment are not in the record or objections, and hence are not included here.

Thereupon the defendants sought to compromise their liability, with the active participation of officers of the Department of Justice; and their offer of $100,000 in settlement had been accepted by the Attorney General and petitioner (Objections, pp. 69-74). Then, however, Assistant Attorney General Arnold filed his petition and brief in the court below for the first time attacking the right of petitioner to bring the action (see the brief certified to this Court by respondents), and thereupon respondents withdrew their offer of compromise (Objections, pp. 75-76). By this action, the Government deliberately abandoned its right to half the recovery already made by petitioner.

Finally, it may be noted that both the court below and the Solicitor General find no merit in the points raised by Assistant Attorney General Arnold. Instead, the Solicitor General has phrased a new issue which, as set forth above, is not only unsound in law but unfounded in fact.

II.

None of the Respondents Is Subjected to Double Jeopardy.

Respondents contend that the recoveries here involved subject them to a second jeopardy. The Fifth Amendment provides:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

There has been no violation of this constitutional protection in this suit, for either or both of the following reasons: (1) Respondents are not being twice held to answer for the "same offense". (2) The sanctions imposed in this suit under R. S. sec. 5438 are purely remedial and not punitive in character.

Respondents base their contention of double jeopardy on the following facts appearing from documents offered but not received in evidence: On November 3, 1939, a true bill was returned against them (R. 295, 301) charging a violation of Section 37 of the Criminal Code, 18 U. S. C. sec. 88:

> If two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

On January 5, 1940, certain of the defendants pleaded nolo contendere to this indictment and the remainder changed their pleas to non contendere on the same day (R. 295-296). On February 6, 1940, the court imposed fines on the defendants in a total sum of $44,000 (R. 299-300).

There were also returned against practically all of the defendants 36 additional indictments under section 35A of the Criminal Code as amended in 1934 and 1938 (18 U. S. C. sec. 80):

> whoever shall * * * make or use or cause to be made or used any false * * * certificate * * * knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both.

In each instance the charge was that the named defendants had in one or more instances made and used and caused to be made and used a specified false certificate knowing the same to contain fraudulent and fictitious statements in a matter within the jurisdiction of a department and agency of the United States in that, in filing bids on certain PWA projects, they had submitted false and fraudulent certificates of non-collusion (R. 322-329). On these 36 indictments no plea was entered by defendants but on February 15, 1940, each was *nolle prossed*.

The respondents also offered to show (R. 125-126) by Mr. Neil Andrews, a special assistant to the attorney general in charge of the criminal prosecutions against defendants, that

> he agreed with the defendants in this case who were also defendants in those criminal proceedings • • • that if the defendants would plead nolo contendere to the indictment at No. 10462 Criminal, the Government would be satisfied with whatever punishment the Court imposed in that case as being also in complete satisfaction of all criminal liability of the defendants on all of the indictments, both for the alleged conspiracy and the false certificates and affidavits of non-collusion which were the matter of the indictments.

The counsel for defendants further stated what has continued to be their contention (R. 126):

> The main purpose is to show that the defendants have already been punished for the same acts upon which a recovery is sought in the present suit, and that, therefore, no recovery for penalties or forfeitures or double damages can be had against them in any other case, and no recovery whatever in this case (Resp. Br. 75-96).

The problem here, therefore, is whether upon the facts there is any double jeopardy involved.

A. THE RESPONDENTS HAVE FAILED TO SHOW THE NECESSARY IDENTITY OF OFFENSES.

The principles of law applicable under the double jeopardy clause are well-established. A defendant may not twice be put in jeopardy of punishment for the *same* offense. But respondents have failed to show that the offenses which were charged in any of the indictments involved in the criminal proceedings are the same as those upon which the verdict and judgment in the instant case were based.

As to the offense of conspiracy charged in indictment No. 10,462.—The conspiracy charged in indictment No. 10462 is distinct and different, as a matter of law, from any of the offenses here involved. In *Burton* v. *United States*, 202 U. S. 344, 380, this Court held:

> It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact*. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*"

In *Gavieres* v. *United States*, 220 U. S. 338, 342, this Court held and in *Blockburger* v. *United States*, 284 U. S. 299, 304, reaffirmed:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

So tested, there is clearly no double jeopardy here.

The conspiracy under section 37 of the Criminal Code charged in the indictment is clearly different from the offenses specified in the first and second clauses of R. S. sec. 5438. Violation of the first clause of the latter statute

could be shown only by evidence of the making of a claim against the United States or the causing of one to be made. Violation of the second clause could be shown only by evidence of the making of false or fraudulent statements, or the causing of them to be made, for the purpose of obtaining or aiding to obtain the approval of claims against the United States. Neither clause requires showing of a conspiracy. On the other hand, conviction on the indictment under Section 37 of the Criminal Code would require proof of a conspiracy, but not the making or aiding of a claim against the United States.[4]

The conspiracy under section 37 of the Criminal Code charged in the indictment is also an offense clearly different in law from the conspiracy inhibited by the third clause of R. S. sec. 5438 and charged in the instant case. The latter clause prohibits conspiracy to defraud the United States "by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim". This particular object of the conspiracy had to be proved under R. S. sec. 5438, but not under Section 37 of the Criminal Code.[5]

It is therefore apparent that there is here involved no second jeopardy for the conspiracy charged in the indictment in No. 10,462 which is the only offense for which respondents have ever suffered punishment.

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[4] It is well established that conspiracy and substantive offenses each involve proof of elements not essential to proof of the other and are therefore not the same. *Carter* v. *McGlaughry*, 183 U. S. 365, 394; *United States* v. *Rabinowich*, 238 U. S. 78, 85; *Chew* v. *United States*, 9 F. 2d 348, 353; *Bell* v. *United States*, 2 F. 2d 543, 544 (C. C. A. 8, 1924); *Coy* v. *United States*, 5 F. 2nd 309, 310 (C. C. A. 9, 1925).

[5] By definition, the offense under the third clause of R. S. sec. 5438 is complete upon a showing of the agreement and the specified object without the necessity of establishing any overt act in furtherance of the conspiracy. On the other hand Section 37 in terms requires evidence of any type of overt act. Under R. S. sec. 5438 the inhibited act is complete and the cause of action is sustained upon the showing of the fact of combination with ensuing damage.

As to the substantive offenses charged in indictments Nos. 10463-10498.—The respondents also rely on these indictments as showing that "double punishment is being inflicted for the same acts in this case" (Resp. Br. 91). This contention is obviously without merit.

In the first place, as the Solicitor General points out (Gov't 53, note), these indictments were *nolle prossed* without so much as a plea having been filed as to any of them. It is elementary that jeopardy within the meaning of the Fifth Amendment does not attach, and an indictment may be *nolle prossed*, at any time before a jury is impaneled and sworn without giving rise to a plea of *autrefois acquit*. *United States* v. *Van Vliet*, 23 Fed. 35, 36; *McCarthy* v. *Zerbst*, 85 F. (2d) 640, 642; *Buie* v. *United States*, 76 F. (2d) 848, 849, cert. denied 296 U. S. 585; *United States* v. *Percansky*, 298 Fed. 991, 993, err. dism., 5 F. (2d) 1020; *Wolff* v. *United States*, 299 Fed. 90, 91.[6]

Secondly, respondents have failed utterly to show that the transactions which were adduced in evidence by petitioner to support the cause of action under clauses one and two of R. S. sec. 5438 are the same transactions which were specified as violations of law in indictments Nos. 10463-10498. The defense of double jeopardy is an affirmative defense and respondents have the burden of proving that the transactions which constitute the offenses upon which recovery in this suit is based are the identical offenses which were the subject matter of the *nolle prossed* indictments. If the transactions in the two cases are not the same *in fact* there obviously can arise no question of identity in law. It is apparent from the portions of the

[6] In the light of this uniform course of decision we join with the Solicitor General in the view that the decision in *United States* v. *Chouteau*, 102 U. S. 603, should be limited to the peculiar situation there involved (Gov't Br. 53). But it is plain that it is here unnecessary to determine the true effect of that decision.

record here printed (R. 190, 202), from respondents' brief (Resp. Br. 9), and from our main brief (p. 10) that violation of the first and second clauses of R. S. sec. 5438 was shown by the I-23 certificates of monthly partial payment claims of the contractors as well as by the certificates of non-collusion filed by the bidders, successful and unsuccessful. Each non-collusion certificate and each I-23 claim containing a false or fraudulent statement or entry is plainly a separate substantive offense under the second clause of R. S. sec. 5438. *Blockburger* v. *United States*, 284 U. S. 299, 303; *Ebeling* v. *Morgan*, 237 U. S. 625, 629. Respondents do not even allege, much less show, that all of the certificates and claims upon which verdict was based in this case were charged as violations of law in the *nolle prossed* indictments. And as a practical matter they cannot show here and could not show in the circuit court of appeals that there was not in the trial court evidence of false I-23 claims or certificates of non-collusion by each one of the named defendants including Ridinger, Sr., and Jr., Bickford and the Iron City Engineering Company. Obviously, if respondents wished to have the circuit court of appeals or this Court hold either that there was no evidence in this case of claims or certificates other than those specified in the indictments or that certain of the defendants made no false certificates of non-collusion or I-23 claims, then it was incumbent on them to have certified to the circuit court of appeals all of the evidence in the case. The appellate court obviously cannot pass on such a question when the appellant brings up a record on appeal which constitutes only a part of the evidence presented in the trial court (R. 392-399). *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 390; *City* v. *Babcock*, 3 Wall. 240, 244; *Wertz* v. *National City Bank of Evansville, Ind.*, 115 F. (2d) 65, 67.

It is therefore submitted that, even if it be assumed, arguendo, that the sanctions imposed under R. S. sec. 3490

for violation of the provisions of R. S. sec. 5438 are properly to be regarded as punitive, the respondents have failed to show that the offenses upon which the instant judgment was based are the same offenses as those covered by the indictments upon which they rely. The asserted identity of offenses is clearly not sustained.

B. THE SUIT UNDER R. S. SEC. 3490 IS REMEDIAL.

The opinion of this Court in *Helvering* v. *Mitchell*, 303 U. S. 391, went far to resolve the fog of uncertainty which theretofore surrounded the question of double jeopardy where civil suits were brought by the United States to enforce monetary relief in addition to fines (or imprisonment) imposed by criminal proceedings. The basic test there laid down is whether the sanction itself is remedial or punitive in character as distinguished from the form of the proceeding. *Id.*, p. 400, note 3. It has always been clear, of course, that the pecuniary detriment to the defendant, which must obtain in any event, does not necessarily render the imposition punitive in nature or penal in effect. *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17; *Stearns* v. *United States*, 22 Fed. Cas. No. 13,341 at 1192 (C. C. Vt.); *Taylor* v. *United States*, 3 How. 197, 210; *Murphy* v. *United States*, 272 U. S. 630, 631-632; *United States* v. *Nash*, 111 Fed. 525, 528.

It is plain that the statute here involved as finally passed, after amendment in the House, contains provisions for three separate and distinct things—(1) for penalties by way of fine and imprisonment in a criminal proceeding, (2) for the payment of a fixed sum and (3) for a variable amount of money to reimburse the United States for damages suffered by it in its proprietary capacity. That Congress intended these to be cumulative is apparent on the face of the original statute itself, for it provided that any person

> who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act * * * shall forfeit and pay to the United States the sum of two thousand dollars, *and in addition*, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, *and* every such person shall *in addition thereto*, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars. (Act of March 2, 1863, sec. 3, 12 Stat. 696, 698, [R. S. secs. 5438, 3490].) (Emphasis supplied)

The question here, therefore, is whether—because of constitutional limitations—the statute shall be cut down by construction.

Here the Congress, taking cognizance of the private injury to the United States as a corporation or body politic and in its proprietary as contrasted with its sovereign capacity, enacted a special statute creating a remedy for the private injury resulting from the direct pecuniary loss incident to the indicated frauds. The purely remedial character of the provisions for a fixed forfeiture and double damages enforcible by distinct civil proceedings in a single suit is emphasized by the provision *in the same section* of the original Act for punitive sanctions to be enforced by separate criminal proceedings. Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 402.

Because the statute clearly contemplates compensation to the United States for damages suffered in its pecuniary or property rights, the essentially remedial character of the sanction provided in R. S. sec. 3490 is much clearer than that of the additional tax involved in the *Mitchell* case,

since all liabilities there imposed on the taxpayer were based upon the sovereign power of taxation.

> The powers of the United States as a sovereign dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the Constitution upon their sovereign powers cannot affect their civil rights. (*Cotton* v. *United States*, 11 How. 229, 231.)

The United States with respect to its own property has a power analogous to the police power of the States measured in the extent of its exercise only by the exigencies of the particular case, and with respect to its property has the rights of an ordinary proprietor to maintain its possession and obtain redress for violation of its rights as could a private individual. *Camfield* v. *United States*, 167 U. S. 518, 525. "Many trespasses are also public offences, by common law, or are made so by statute. But the punishment of the public offence is no bar to the remedy for the private injury." *Cotton* v. *United States*, 11 How. 229, 232; *Stone* v. *United States*, 167 U. S. 178, 188-189. So here it is plain that the prescribed remedy for the private injury to the United States—forfeiture of the fixed sum of $2,000 and double damages—cannot reasonably be held to be barred by the fact that the wrongdoers are also guilty of, and have been fined for, a public offence.

The provision here for a fixed $2,000 forfeiture plus double damages bulks no larger in amount than the treble damages authorized under section 7 of the Sherman Act. The federal courts have taken the view that Section 7 is intended to provide compensation for injuries to property,

and is remedial in purpose. Thus, for the purpose of applying statutes of limitation, the courts have held that an action under Section 7 is remedial and not an action to recover a penalty or forfeiture. *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 Fed. 900, 904, reversed on other grounds, 127 Fed. 23 (C. C. A. 6th), affirmed 203 U. S. 390; *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364, 367 (D. C. S. D. N. Y. 1939); *Jones & Co.* v. *West Publishing Co.*, 270 Fed. 563, 566 (C. C. A. 5th); *Shelton Electric Co.* v. *Victor Talking Mach. Co.*, 277 Fed. 433, 435 (D. C. N. J. 1922). The same view has been taken in cases involving the question of whether the right to sue under Section 7 survives death. *Sullivan* v. *Associated Billposters*, 6 F. (2d) 1000, 1009 (C. C. A. 2d); *Imperial Film Exch.* v. *General Film Co.*, 244 Fed. 985, 987 (S. D. N. Y. 1915); *Moore* v. *Backus*, 78 F. (2d) 571, 575 (C. C. A. 7th). See also *Baush Machine Tool Co.* v. *Aluminum Co.*, 63 F. (2d) 778, 780, cert. denied, 289 U. S. 739, holding that an action under Section 4 of the Clayton Act for triple damages is not a suit for penalty and, hence, that a bill of discovery may be maintained in aid of the suit. The cases are collected and examined in *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?* by Lawrence Vold, 28 Ky. L. J. 117-159. The author concludes (p. 149): "As already shown, the threefold damage provision is here compensatory in its nature, in liquidating compensation for accumulative intangible harm going beyond the ordinarily recoverable legal damages to the business or property." See also *Right of United States to Sue for Treble Damages*, 89 U. of Pa. L. Rev. 243-245, fn. 10.

As pointed out in *Helvering* v. *Mitchell*, *supra*, p. 400,

> forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789

and as being civil in nature "against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." The same case also recognizes the fact that, where Congress has provided a distinct civil procedure for the collection of the additional liability, this is regarded as indicating clearly that Congress intended a civil and not a criminal sanction. *Id.*, pp. 402-404. Again, that decision recognizes that the fact that the several liabilities or sanctions are separately, successively, and distinctly stated—as in the statute here involved—"helps to make clear the character" of those involved as civil and criminal respectively. *Id.*, p. 404.

In *United States* v. *Griswold*, 24 Fed. 361, sustaining a *qui tam* action under R. S. sec. 5438, the court specifically held (p. 366): "The statute is a remedial one."

III

The Remaining Questions Raised by Respondents Are Without Merit

Respondents refer to an old statute requiring the consent of Treasury officials for the institution of suits "for the recovery of taxes, or of any fine, penalty, or forfeiture" (Resp. Br. 97). However, that provision is derived from a statute predating the creation of the Department of Justice and reflecting an era when the Solicitor of the Treasury was—in connection with public litigation in the courts—what the Attorney General is today.[7] By the statute here involved, moreover, Congress manifestly intended that private parties be authorized to bring suit without consent of public officials; that was the very purpose of the statute, as set forth in Point I above; and, if such consent be now

[7] Since the Government has referred to a history of the Department of Justice (Gov't Br. pp. 15-16), petitioner may be justified in referring to the same work wherein it is stated that, despite the creation of the Department of Justice, "old statutes had not been expressly repealed and had found places in the Revised Statutes, the compilation of which had been authorized and begun before the creation of the Department of Justice." Cummings and McFarland, Federal Justice, p. 488.

held requisite, the very purpose of the statute is nullified. Respondents also (Br. 99) refer to Executive Order No. 6166 of June 10, 1933, shifting governmental functions between federal agencies and transferring—or confirming—the prosecution of "claims" to the Department of Justice. The court below has fully set forth one of the reasons why it, as well as R. S. sec. 3214, can have no effect upon the statute here involved (R. 481-483).

Respondents next attempt to show that no damage was shown by the evidence (Br. 103-109). The gist of their argument is that the municipalities actually spent on the project an extra amount greater than the damage proved (they specify only 3 of the 56 projects), and that therefore the damage must be taken to have been paid solely by the sponsors in connection with each project. The answer, however, is clear enough. The sponsors, as the work progressed, may have added to the construction or have otherwise incurred any amount of additional expense; and respondents merely ask this Court to assume that all additional expense—above the original estimated cost of the project in which alone the Government agreed to share the expense—must be allocated to the payment of excessive costs brought about by respondents' fraud. In short, their damage argument is merely another method by which respondents seek—under cover of the municipality—to immunize themselves from liability to the United States. Unless the statute is to be defeated, the orthodox rule of damages, apportioned according to the percentage the United States had agreed to contribute, should be followed as was done here. *People* v. *Stephens*, 71 N. Y. 527, 559; *West Homestead Borough* v. *Erbeck*, 239 Pa. 192, 86 Atl. 773. The sole evidence is that such rule accurately measures the actual loss of the United States (R. 506, 520). Indeed, the respondents later in their argument admit that the rule applied is proper, saying: "We have raised no question about that being the proper measure of damages."

(Resp. Br. 109.) The jury found damage (R. 338). Neither of the courts below accepted respondents' argument, and the circuit court of appeals very properly held that by respondents' acts "the government was defrauded in that it was compelled to contribute more for the electric work * * * than it would have been required to pay had there been free competition in the open market" (R. 472).

Respondents' next argument, that they were entitled to show "the actual cost of doing the electrical work on the projects in question" (Br. 110-113), is likewise unsound. The question here is not what costs respondents incurred, but what a reasonable, free, open, and non-collusive bid would have been as of the time of the bidding. *People* v. *Stephens*, 71 N. Y. 527. In common sense, what respondents spent—in an aura of rigged bidding and exorbitant profits—is immaterial. To adopt any such rule would lay a premium upon fraud and assure the fraudulent that their actual expenditures will always be safeguarded. The rule, as stated above in the previous paragraph, is to the contrary.

Respondents complain that character evidence was excluded (Br. 114). This argument is expressly founded, and can only be founded, upon the theory that the fixed sum recoveries here involved are penal in character. *Thompson* v. *Bowie*, 4 Wall. 463, 471; *Quinalty* v. *Temple*, 176 Fed. 67, 69 (C. C. A. 5.) But that no part of the recoveries here involved are penal is fully set forth in Point II(B), *supra*.

Respondents argue that counsel for petitioner improperly referred to the prior criminal proceedings, in his argument to the jury in this case (Br. 115-116). But respondents themselves injected this fact into the case in their opening statement to the jury and in their summation at the conclusion of the trial (R. 384-385).

Respondents conclude with an argument that only one fixed sum recovery—$2,000 and no more—should be permitted against, and apportioned among, them no matter how

many fraudulent I-23 statements or non-collusion certificates they may have submitted and no matter how many projects and contracts were involved. But each submission of a fraudulent I-23 statement by respondents constitutes a separate claim and hence a separate item of liability. *Blockburger* v. *United States*, 284 U. S. 299, 303; *Ebeling* v. *Morgan*, 237 U. S. 625, 629. However, the trial court refused to allow a fixed sum recovery for every such submission and instead allowed one only for each separate contract or project. Petitioner took no cross appeal to the court below and of course cannot raise the point here in order to increase the number of fixed sum recoveries. But plainly the allowance of the fixed sum recovery for each project or contract is proper. Any other rule would be putting a premium upon continuing conspiracies, as respondents here seek to have this Court do. Moreover, only the third clause of the statute here involved includes conspiracy as an element; but each clause includes "claims" as an element. Even if the liability here be confined to the third clause of R. S. sec. 5438 involving conspiracy, that clause also includes "any agreement"; and the respondents here entered into an "agreement" respecting each bidding on each contract. Finally the statute expressly states that "*any person* • • • who shall do or commit any of the acts prohibited by any of the foregoing provisions • • • shall forfeit and pay to the United States the sum of two thousand dollars" (12 Stat. 696, 698); here there were 55 defendants (R. 1, 338); and thus by the terms of the statute, even under respondents' argument there should be at least 55 separate fixed sum recoveries in the sum of $110,000 rather than the mere $2,000—or $36.36 each—for which respondents contend.

Respectfully submitted,

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